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No. 97-1176

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

FLUOR CORPORATION AND AFFILIATES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL FOREIGN TRADE COUNCIL, INC. IN SUPPORT OF PETITIONER'S REQUEST FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court's decisions in *Manning v. Seeley Tube & Box Co.*, 338 U.S. 561 (1950) (interpreting the Internal Revenue Code of 1939), and *United States v. Koppers Co.*, 348 U.S. 254 (1955) (interpreting the Excess Profits Tax Act of 1940) require that deficiency interest must be imposed under section 6601(a) of the Internal Revenue Codes of 1954 and 1986, or whether foreign taxes are "deemed paid or accrued" in the year to which such taxes are carried back and thereby eliminate any deficiency for such prior year under section 904(c) of those Codes?

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BRIEF OF *AMICUS CURIAE* NATIONAL FOREIGN TRADE COUNCIL, INC. IN SUPPORT OF PETITIONER'S REQUEST FOR WRIT OF CERTIORARI

STATEMENT OF INTEREST

The National Foreign Trade Council, Inc. ("NFTC") is a New York not-for-profit corporation with more than 550 member firms, founded in 1914.[1] It is the oldest and largest U.S. association of businesses devoted to international trade matters. Its membership consists primarily of U.S. firms

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[1]Counsel for amicus curiae and others, other than counsel for a party, authored this brief. Counsel for petitioner made suggestions during the drafting process that assisted the authors. No other person or entity other than amicus curiae and its members made monetary contributions for the preparation and submission of the brief. The petitioner is a member of *amicus* NFTC, but has not made a monetary contribution to the preparation or submission of this brief beyond that of other members of the NFTC.

engaged in all aspects of international business, trade, and investment. Most of the largest U.S. manufacturing companies and most of the 50 largest U.S. banks are Council members. Council members account for some 70% of all U.S. non-agricultural exports and 70% of U.S. private foreign investment.

The NFTC has a strong interest in the Court's resolution of this case because the decision of the Federal Circuit Court of Appeals adversely affects the foreign tax credit mechanism relied on by the NFTC's member companies. The foreign tax credit is the fundamental way in which the United States accommodates its right to tax income with the rights of other governments to tax that same income. The principal objective of the foreign tax credit is to avoid international double taxation and, thus, facilitate international trade and investment. The carryback provisions of the foreign tax credit are a key element of the foreign tax credit mechanism. The proper application of the foreign tax carryback provisions as they affect deficiency interest is, therefore, an important issue for United States multinational corporations. The issues presented by the case have great significance to the membership of the NFTC.

The government's imposition of deficiency interest in this and similar cases has serious financial consequences. It is estimated that the amounts at issue total more than one hundred million dollars.

Counsel for the parties have consented to the filing of this brief in letters filed with the Clerk of the Court.

STATEMENT OF THE CASE AND FACTS

Amicus adopts the statement of the case and facts as set forth by Petitioner.

REASONS FOR GRANTING THE PETITION

The Federal Circuit's decision in the instant case is the first decision by an appellate court under the 1954 and 1986 Codes on the issue presented. This issue is present for many taxpayers, with substantial amounts at stake. If this Court does not agree to hear the instant case, other taxpayers will litigate this issue. It may be expected that such litigation will be prolonged and expensive. This process can be shortened and much expense to taxpayers and the government saved, if this Court agrees to hear the instant case. A Supreme Court decision would bring uniformity of interpretation to the law and resolve a major area of controversy with the government for U.S. multinational corporations.

I. The Legislative History of the Foreign Tax Carryback Provisions Clearly Establishes A "Matching Policy" that Negates the Imposition of Deficiency Interest.

Deficiency interest, if imposed, would result in a cost to the taxpayer that would, in effect, constitute double taxation. Under often disparate foreign and United States tax accounting rules, United States multinationals frequently have foreign income that is taxed in the United States in one year, but taxed by foreign jurisdictions in another taxable year. Section 904(c) established a mechanism to allow a U.S. taxpayer, over an

eight-year period, to carryback or carryover excess foreign taxes paid in any one year and to credit such foreign taxes against U.S. taxes paid on foreign income in a different year. While this "matching" of foreign taxes paid and foreign income recognized for U.S. tax purposes is not done on a tracing basis, the policy of matching is more fully achieved when the foreign tax that is carried back is "deemed" paid or accrued in the year to which it is carried back, with no deficiency interest being imposed during the interim years.

In enacting section 904(c), Congress stated:

> Double taxation can occur at present because of the manner in which this country-by-country limitation works where the methods of reporting income are different in the United States and the foreign country. These differences may result in the same income being reported in one year in the United States and in another year in the foreign country. When this occurs the foreign tax credit available will tend to be less than the taxes paid or accrued to the foreign country in the year the income is reported in that country but not in the United States. In another year when this income is reported in the United States but not the foreign country, the credit which would be available under the limitation will tend to exceed the foreign taxes paid or accrued.

H.R. Rep. No. 775, 85th Cong., 1st Sess. 27-28 (1957).

In 1992, then Assistant Treasury Secretary for Tax Policy Fred T. Goldberg, Jr. explained:

> The legislative history of section 904(c) indicates that the existing foreign tax credit carryover rules were enacted to address the concern that foreign and U.S. accounting rules may differ, causing certain items of income or deductions to be taken into account in different years for foreign and U.S. tax purposes. . . . In the case of such a difference, the allowance of a carryover period enhances the likelihood that foreign taxes will be creditable against the U.S. tax liability with respect to the foreign source income on which they were imposed, *thus promoting the economic matching of income and deductions*.

Foreign Income Tax Rationalization and Simplification Act of 1992: Hearings Before the House Comm. on Ways and Means, 102d Cong., 2d Sess. 224, 236 (1992) (emphasis added).

On July 28, 1995, then Assistant Treasury Secretary for Tax Policy Leslie B. Samuels made a statement to the same effect:

> The reason the Code permits the carryover of foreign taxes is that foreign and domestic tax accounting rules may differ, resulting in income being taxed in the United States and a foreign country in different years.

Miscellaneous Tax Reforms: Hearings Before the House Comm. on Ways and Means, 104th Cong., 1st Sess. 233, 264 (1995).

In sum, the foreign tax credit mechanism attempts to accommodate the differences between tax systems so as to avoid double taxation. The carryback / carryover provisions provide, in effect, an eight-year period within which to achieve

this matching of income and deductions. Imposing interest charges when a foreign tax is carried back is inconsistent with the matching policy of the foreign tax credit. Matching of foreign and United States tax results is more fully achieved by not imposing deficiency interest when a foreign tax carryback eliminates the deficiency in tax. The Federal Circuit chose to ignore this important legislative history explaining the reasons for the "deemed paid or accrued" tax accounting rule in section 904(c) that negates the imposition of deficiency interest.

II. The "Plain Language" of the Statute Requires a Decision For the Taxpayer.

The issue in the instant case is straightforward. Section 904(c) provides that foreign taxes carried back to a prior year are "deemed paid or accrued" in the earlier year. The statute is unambiguous and should be applied as written. *See Chevron, USA, Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The United States Court of Federal Claims ("Claims Court") held in favor of the taxpayer, relying on the "plain language" of the statute. *Fluor Corporation* v. *United States*, 35 Fed. Cl. 520 (1996). The Claims Court regarded the legislative language of section 904(c) as a "clear expression of legislative intent." While taking account of the government's arguments that the overpayment and refund interest cases were not parallel from a "time value of money" standpoint, the Claims Court pointed out that Congress has, on occasion, chosen not to conform the refund and deficiency interest provisions. The Claims Court regarded section 904(c) as such

a congressional choice.

In contrast, the Federal Circuit ignored the clear language of the statute.

It is important for the Supreme Court to establish the correct standards of construction for the lower courts and the Internal Revenue Service to use in interpreting the tax laws. Obviously, if the plain language of the statute calls for a result, it should be followed by the courts. Nonetheless, the Federal Circuit found, based on the legislative history, that the statute was ambiguous and deficiency interest could be imposed. Yet, if recourse to legislative history is necessary because of ambiguity in the statute, the legislative history should be used to help interpret the statute, not to override it, as was done in this case. *See West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83 (1991).

III. The Congress Explicitly Recognized That the Statutes Would Need to Be Changed to Affect a Change in Prior Law.

Congress, in the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, section 1055, 111 Stat. 788, changed the deficiency interest rule in foreign tax carryback cases. While we believe that the pre-1997 rule giving priority to the "matching" policy was correct, we respect the right of the Congress to change policy and accept its ability to enact clear statutory provisions to implement that policy.

Further, the legislative history of the 1997 Act itself confirms that there was a change in policy. A revenue estimate

of $27 million shows that Congress intended to make a change in the law, and expected to increase revenues prospectively by this action. *See Comparison of the Estimated Budget Effects of the Revenue Provisions of H.R. 2014 As Passed by the House and the Senate*, Joint Committee on Taxation, JCX-37-97 (July 10, 1997), at 2.

This fact that Congress chose to make this explicit choice in the context of this intricate, detailed, comprehensive statutory framework in 1997 is important.

Under the sparse statutory scheme considered in *Seeley Tube, supra,* the absence of a deficiency-interest counterpart to the statutory refund-interest provision might indicate some simple Congressional oversight – the possibility that an NOL carryback could generate a tax refund would be apparent, but the possibility that a carryback might instead reduce or eliminate a deficiency might have been overlooked at the time. However, in 1958, when Congress provided for carrybacks of foreign tax credits,[2] any opportunity for speculation by the courts as to Congressional intent had been eliminated. In 1954, Congress had added section 6601(d)(1) to the Code, specifically requiring deficiency interest to accrue on a tax liability later eliminated by an NOL carryback; the interest accrued through the end of the origination year. Internal Revenue Code of 1954, Pub. L. No. 83-591, section 67, 68A Stat. 3, 817 (1954). Congress had codified the holding of *Seeley Tube, supra. See* S. Rep. No. 1622, 83d Cong., 2d Sess. 590 (1954); H.R. Rep. No.1337, 83d Cong., 2d Sess. A418 (1954).

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[2]Technical Amendments Act of 1958, Pub. L. No. 85-866, section 42(a), 72 Stat. 1606, 1639-40 (1958).

When Congress enacted section 904(c) in 1958, it simultaneously added section 6611(g) to the Code,[3] which provision denied statutory interest to taxpayers whose foreign tax credit carrybacks resulted in refunds. Even though Congress had seen fit only four years earlier to codify *Seeley Tube's* holding imposing statutory interest on tax deficiencies offset by NOL carrybacks, Congress did not choose to add a similar deficiency-interest provision applicable to foreign tax credit carrybacks. "[I]t is generally presumed that Congress acts intentionally and purposefully when it includes particular language in one section of a statute but omits it in another," and the specific enactment of a deficiency-interest provision applicable to NOL carrybacks manifestly "show that Congress knew how to draft [such a provision applicable to foreign tax credit carrybacks] when it wanted to." *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) (internal citations and quotations marks omitted); see also *Campbell v. Commissioner*, 108 T.C. 54 (1997), at 66-67 (existence of provision in prior statute, coupled with omission of similar provision from current statute, justifies inference that omission, although unexplained in legislative history, was intentional). The foreign tax credit carryback was enacted in a statutory environment critically different from that which the Supreme Court considered in *Seeley Tube*.

This Congressional intent became overwhelmingly more evident over the years in question. Between 1959 and 1982, Congress amended section 6601(d) no less than nine times. Repeatedly, Congress expanded section 6601(d) to impose statutory interest on tax deficiencies offset by newly enacted

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[3]Technical Amendments Act of 1958, Pub. L. No. 85-866, section 42(b), 72 Stat. 1606, 1639-40 (1958).

carrybacks, such as the investment credit carryback,he work incentive credit carryback,[5] and the new employ credit carryback.[6] Moreover, Congress revisited and modifisection 6601(d) on two other occasions during that time, incling the overhaul of the entire provision in 1978.[7]

On each of these occasions, Congress did not oose to impose statutory interest on deficiencies offset by foign tax credit carrybacks. That, as previously stated, is an iportant fact. Further, given the intricate, detailed, compnsive statutory mechanisms, and the underlying policies suorting them, this is no area in which a court should applys own views of legislative history and common law prinles to engraft requirements not otherwise explicitly provid by the

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[4]Revenue Act of 1962, Pub. L. No. 87-834, section 2(e)(3), 76 t. 1128, 1143 (1962).

[5]Revenue Act of 1971, Pub. L. No. 92-178, section 601(d)(3), 85at. 545, 627 (1971).

[6]Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-section 202(d)(4), 91 Stat. 126, 150 (1977). *See also* Pub. L. No. 88-57section 3(d), 78 Stat. 980, 982 (1964) (carrybacks of certain unused dedtions of life insurance companies); Pub. L. No. 90-225, sec. 2(e), 81 Stat. 0, 731 - 2 (1967) (unused investment tax credit arising from NOL carrybs); Tax Reform Act of 1969, Pub. L. No. 91-172, section 512(e)(3)(C33 Stat. 509, 697 (1969) (capital loss carrybacks); Tax Reform Act of 197Pub. L. No. 94-455, section 2107(g)(2)(C), 90 Stat. 1520, 1904 (1976) (W credit carryback attributable to investment tax credit carryback from ssequent year).

[7]Pub. L. 95-628, section 8(c)(2), 92 Stat. 3627, 3632 (1978); T Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, seon 201 (c)(3), 96 Stat. 324, 419 (1982) (carryback of foreign tax credillowed against alternative minimum tax).

drafters.

CONCLUSION

The taxpayer, the government, and tax professionals all agree: whether deficiency interest must be imposed or whether foreign taxes are "deemed paid or accrued" in the year to which such taxes are carried back is of enormous and overriding importance to the government and to taxpayers across the country. The enormous financial impact aside, this case raises fundamentally important questions regarding how federal courts must read tax statutes. To resolve these issues of great importance in the administration of the tax laws and the conflicts in the conceptual approaches of two courts, this Court should grant the taxpayer's petition for a writ of certiorari.

Respectfully submitted,

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